UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

V.P. WINTER DISTRIBUTING CO. PROFIT SHARING RETIREMENT PLAN AND TRUST, et al.,	)	
Plaintiffs	)	
v.	)	*Civil No. 89-0081 P*
WILLIAM G. THIBODEAU, SR., et al.,	)	
Defendants	)	

RECOMMENDED DECISION ON CROSS-MOTIONS FOR JUDGMENT

This is an interpleader action to establish the rights of potential claimants to the proceeds from a decedent's account in a profit sharing retirement plan and trust controlled by the plaintiffs and governed by the Employees' Retirement Income Security Act of 1974 (``ERISA"), 29 U.S.C. ' 1001 *et seq.* The court (Carter, C.J.) has ordered the plaintiffs dismissed upon the payment into an interest-bearing account in the registry of the court of the sum of $34,422.04 plus accumulated interest. The defendants remaining in this action are: William G. Thibodeau, Sr. (``Thibodeau") in his capacity as personal representative of the Estate of Richard Thibodeau, Laurie Martin (``Martin") and Mary Fitzpatrick (``Fitzpatrick"). The issue before the court is which of defendants Martin and Thibodeau is entitled to the deposited funds, less attorneys fees awarded to the plaintiffs.[1]

[1] Defendant Martin has filed a motion for judgment based on stipulated facts. Although defendant Thibodeau has filed a motion for summary judgment, it is clear from the papers and from a statement of his counsel made at oral argument on January 12, 1990 that he too seeks judgment on the basis of the stipulation of facts entered into by all three defendants. Joint Motion to Amend Scheduling Order and for Judgment & 4; Stipulation of Undisputed Material Facts (``Stipulation"). *See Gulf of Maine Trawlers v. United States*, 674 F. Supp. 927, 931 (D. Me. 1987) (citing *Boston Five Cents Sav. Bank v. Secretary of Dep't of Housing and Urban Development*, 768 F.2d 5, 11-12 (1st Cir. 1985)). Defendant

Fitzpatrick has objected to neither motion and has filed no separate motion of her own.

The stipulated facts may be summarized as follows: The decedent, Richard Thibodeau, who was employed by V. P. Winter Distributing Co. (``Winter''), was a participant in the Winter Profit Sharing Plan (``WPSP'') established as of December 1, 1975 and the Winter Employee Stock Ownership Plan (``WESOP'') established as of December 1, 1984, both of which plans were subject to the provisions of ERISA. Stipulation && 1-3. The decedent's tenure at Winter began on or about June 6, 1977 and ended on or about May 28, 1988. *Id.* && 1, 5. While employed at Winter, he completed two beneficiary designation forms: one designating defendant Fitzpatrick as the primary beneficiary and defendant Martin as the secondary beneficiary of the WPSP, and the other designating Martin as primary beneficiary and Fitzpatrick as secondary beneficiary of the WESOP. *Id.* & 4. Upon the decedent's termination from Winter, he received, pursuant to the terms of the WPSP, the vested balance from his WPSP account. *Id.* & 5. In accordance with the provisions of the WESOP, however, the vested balance of the WESOP remained invested in his account. *Id.* On or about September 23, 1988 Winter formed the V.P. Winter Distributing Co. Profit Sharing Retirement Plan and Trust (``Winter Trust'') which merged the WPSP into the WESOP. *Id.* & 6. The Winter Trust provides: ``Employees who are Participants in the [WPSP] or the predecessor [Winter] Employee Plan and Trust become Participants in this Plan effective December 1, 1987." *Id.* and Exh. #5 thereto at & 1.01. Thus, the decedent became a participant of the Winter Trust and his vested account balance from the WESOP was invested in the Winter Trust. *Id.* & 7. By letter dated October 3, 1988 Winter's treasurer, who also served as plan administrator of the Winter Trust, notified the decedent that one of the provisions of the Winter Trust allowed a plan participant who was no longer an employee to make an election either to receive the vested balance of his account or to leave such vested balance invested in the trust. *Id.* & 8. The decedent elected in writing to receive the vested balance of his account, then calculated to be $34,422.04, as a lump-sum payment. *Id.* & 9. By letter

dated October 26, 1988 the plan administrator authorized the trustee bank to pay 25 participants, including the decedent, their respective amounts under the Winter Trust. *Id.* & 10 and Exh. #8 thereto. Enclosed with the letter were 25 Notices of Termination/Payment Authorization forms executed by the plan administrator. Stipulation Exh. #8. One of the forms, dated October 24, 1988, pertained to the decedent. Stipulation & 10 and Exh. #9 thereto. The trustee bank was directed to process the payments as soon as possible. Stipulation Exh. #8. The authorization form sent to the trustee stated in part, just above the signature of the plan administrator, the following:

> I hereby agree and understand that all payments will be processed within ten business days from receipt of completed form and authorization and is contigent (sic) upon the availability of collected funds, additionally all payments (checks) will be remitted to my company (``the client") for review. Upon our review and approval, payment will be remitted by ourselves to the Participant or Beneficiary.

Stipulation Exh. #9. Pursuant to the letter and payment authorization forms, the trustee prepared checks for all 25 distributees, including one made payable to the decedent in the amount of $34,422.04, on or about October 31, 1988. Stipulation & 10. On or about November 1, 1998 the trustee bank forwarded those checks to the plan administrator. *Id.* On November 8, 1988 the decedent's body was discovered in his apartment. *Id.* & 11. Unaware of the decedent's death, on November 9, 1988 the plan administrator caused the check payable to the decedent, together with a cover letter dated November 8, 1988, to be deposited with the U. S. Postal Service for delivery to the decedent by certified mail. *Id.* & 12. When the certified letter containing the check remained unclaimed for the requisite period, the Postal Service returned the item to Winter whereupon the plan administrator caused the check to be deposited in a segregated account bearing the decedent's name. *Id.* && 13, 14. The decedent died intestate and Thibodeau was appointed personal representative of his estate. *Id.* & 15.

I first address defendant Martin's claim to the pension account proceeds. Martin claims that: (i) she is entitled to the proceeds because such proceeds are payable pursuant to Article VI of the Winter Trust as death benefits, and (ii) as the primary beneficiary of the decedent's WESOP plan which was merged into the Winter Trust, she is entitled to the distribution pursuant to the trust. Whether or not Martin's claim lies depends upon a construction of the terms of the Winter Trust and the relevant ERISA provisions. *Blackmar v. Lichtenstein*, 603 F.2d 1306, 1309 (8th Cir. 1979) (terms of an employee benefit plan trust are to be followed unless inconsistent with the fiduciary requirements of ERISA). Moreover, the terms of an ERISA plan which direct the method of determining the beneficiary preempt state laws relating to such a determination. 29 U.S.C. ' 1144(a); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S 41, 45 (1987); *MacLean v. Ford Motor Co.*, 831 F.2d 723, 726-27 (7th Cir. 1987).

The first question, therefore, is whether the proceeds are payable as death benefits according to the terms of the Winter Trust. Section 7.04 of the Winter Trust states in relevant part:

> If a Participant whose employment terminates otherwise than by Retirement, Disability, or death has a nonforfeitable right to any portion of his account(s), such nonforfeitable portion shall be distributable in accordance with Article VI, above. For purposes of Article VI, above (other than the election specified in Section 6.11), Retirement shall be deemed to occur upon termination of the Participant's employment with the Employer. The entire nonforfeitable portion of such Participant's account(s) shall be distributed to the Participant as soon as reasonably possible after the Participant's termination of employment . . . if . . . (b) the Participant elects upon such termination to receive the nonforfeitable portion.

Stipulation Exh. #5 at pp. 36-37. Because the decedent's employment terminated otherwise than by retirement, disability or death, Article VI, which addresses benefits, is applicable and for the purposes thereof (excluding the election specified in ' 6.11) the decedent is considered to have retired. Section 6.06, which addresses death benefits, states in relevant part:

> In the case of the death of a Participant *before distribution of benefits has commenced* pursuant to Section 6.11, below, the entire balance of the Participant's accounts shall be paid in a lump sum, and such balance shall be completely distributed within 5 years after the death of the Participant.

Id. at p. 27 (emphasis added). Thus, the underlying issue is whether a distribution of benefits had commenced before the decedent's death. Martin claims that no distribution commenced because the decedent died before the check and letter accompanying the check were mailed.

Although the trust document does not provide a definition of the term ``distribution," several sections of Article VI address the mechanics of the distribution process. Section 6.02 provides that ``[t]he balance of a Participant's account or accounts shall be *paid* in cash in a lump sum." *Id.* at p. 26 (emphasis added). Section 6.11 addresses when the distribution shall occur. This section states in relevant part:

> Unless the Participant elects otherwise, *payment* of benefits shall be made or commence no later than the sixtieth (60th) day after the close of the Plan Year in which occurs the latest of the following events:
>
> (a) the date on which the Participant attains Normal Retirement Age,
>
> (b) the 10th anniversary of the date on which the Participant commenced participation in the Plan, or
>
> (c) *the termination of the Participant's service with the Employer*.

Id. p. 31 (emphasis added). Reading '' 6.02 and 6.11 together, I determine that a distribution occurs when the participant is paid some or all of his benefits.

In this case the stipulated facts and material before the court show that the decedent was not paid any of his benefits before his death. Although the decedent's election to receive his distribution in a lump sum resulted in the plan administrator's authorization to the trustee to prepare a check in the

amount of the vested balance of his account, the authorization was restricted to the preparation of the check and reserved to the company the power to approve and remit payment. The authorization specifically directed the trustee to return the check to the company and further stated: ``Upon our *review and approval, payment will be remitted by ourselves to the Participant or Beneficiary*." Stipulation Exh. #9.[2] Given the meaning of the term ``remit"[3], it is clear that payment was never remitted to the decedent *before* his death. I conclude, therefore, that the benefits are payable as death benefits because the participant died before distribution had commenced.[4]

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[2] The allocation of responsibility set forth in the authorization form reflects the respective duties of the trustee, the committee on employee benefit plans (``Committee") and the plan administrator, all of which are set forth in the trust. *See* Stipulation Exh. #5 at '' 9.04, 1.03, 1.05.

[3] ``[T]o send (money) to a person or place (as in payment of a demand, account, draft) . . . ." *Webster's Third New International Dictionary* (1981).

[4] I note that this conclusion finds additional support in the provision of the Winter Trust requiring that the trust be construed in accordance with the Internal Revenue Service Code. Stipulation Exh. #5, ' 1.09 at p. 7. The Code defines the term ``lump sum distribution" as:

the distribution *or payment* within one taxable year of the *recipient* of the balance to the credit of an employee which becomes payable to the recipient --

(i) on account of the employee's death,
(ii) after the employee attains age 59 1/2,
(iii) on account of the employee's separation form the service, or
(iv) after the employee has become disabled . . . .

26 U.S.C. ' 402(e)(4)(A) (emphasis added).

Defendant Thibodeau argues, however, that Article VI does not apply because once the decedent made his election to receive the lump sum pursuant to ' 7.04 of the Winter Trust he was no longer a participant in the plan. This argument clearly fails. First, as noted earlier ' 7.04 directs the application of Article VI because the decedent terminated his employment other than by retirement, disability or death. Second, the decedent's election simply did not affect his ``participant" status. ERISA defines a participant as:

> any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer . . . .

29 U.S.C. ' 1002(7). Defendant Thibodeau relies on the definition of ``participant" provided in the Pension Benefit Guaranty Corporation regulations applicable to single-employer and multiemployer plans which reads in relevant part:

> ``*Participant*" means any individual who is included in one of the categories below:
>
> . . . .
>
> (b) *Inactive* -- (1) *Inactive receiving benefits*. Any individual who is retired or separated from employment covered by the plan and who is receiving benefits under the plan. This category does not include an individual to whom an insurance company has made an irrevocable commitment to pay all the benefits to which the individual is entitled under the plan.
>
> (2) *Inactive entitled to future benefits*. Any individual who is retired or separated from employment covered by the plan and who is entitled to begin receiving benefits under the plan in the future. This category does not include an individual to whom an insurance company has made an irrevocable commitment to pay all the benefits to which the individual is entitled under the plan.

29 C.F.R. ' 2610.2. He claims that, because the decedent made his election to receive the lump sum distribution, he was ``irrevocably entitled" to the proceeds and therefore he fell within the category of

individuals excluded under the regulations from the definition of a participant. Thibodeau's reliance on this section of the regulations is misplaced. Even assuming that ' 2510.2 has any applicability here, ' 2510.3-3(d) clarifies the exception noted therein. This section states in relevant part:

> An individual is not a participant covered under an employee pension plan . . . if --
>
> (A) The entire benefit rights of the individual --
>
> > (1) Are fully guaranteed by an insurance company, insurance service or insurance organization licensed to do business in a State, and are legally enforceable by the sole choice of the individual against the insurance company, insurance service or insurance organization; and
> >
> > (2) A contract, policy or certificate describing the benefits to which the individual is entitled under the plan has been issued to the individual; *or*
>
> (B) The individual has received from the plan a lump-sum distribution or a series of distributions of cash or other property which represents the balance of his or her credit under the plan.

29 C.F.R. ' 2510.3-3(d)(2)(ii) (emphasis added). The decedent does not fall within either category. Defendant Thibodeau does not claim that the decedent's rights were fully guaranteed by an *insurance company*, and, as discussed above, the decedent never *received* a lump sum distribution which represented the balance of his or her account under the plan.

The applicable case law also undercuts Thibodeau's claim. In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. ___, 109 S. Ct. 948 (1989), the Supreme Court recently held that the term ``participant" includes a former employee who has ```a colorable claim' to vested benefits," *Firestone* 489 U.S. _, 109 S. Ct. at 958 (citing *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir.), *cert. denied*, 479 U.S. 916 (1986), meaning ``that (1) he will prevail in a suit for benefits, or that (2) eligibility

requirements will be fulfilled in the future," *id.* In this case, the fact that the decedent was entitled to benefits by virtue of his election establishes that he had a colorable claim to his vested benefits.[5]

Finally, the terms of the Winter Trust itself confirm that the decedent was still a participant after his election. The trust document states that ``[a]fter an employee has become a Participant, the continuance of his status as a Participant shall be determined by reference to the definition of a `Participant' in ERISA Section 3(7).[6]" Stipulation Exh. #5, ' 2.01 at p. 12. Moreover, under the subject heading ``Valuation" the trust document states that the term ```Participant' includes a person from whose account distributions are being made." *Id.* ' 5.02 at p. 24. It would be illogical to conclude that the decedent was not a participant because he was entitled to receive a lump sum distribution when the trust instrument includes in the term an individual who has been receiving his distribution in installments and is entitled to the remaining proceeds in his account.

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[5] *Cf. Joseph v. New Orleans Elec. Pension & Retirement Plan*, 754 F.2d 628 (5th Cir.) *cert. denied*, 474 U.S. 1006 (1985), in which the Court of Appeals for the Fifth Circuit construed the statute and the regulations to exclude from the term ``participant" ``retirees who have accepted the payment of everything due them in a lump sum, because these erstwhile participants have already *received* the full extent of their benefits and are no longer eligible to receive future payments." *Id.* at 630 (emphasis added). The Fifth Circuit recently held that, where plaintiffs had a colorable claim that they had received less than the full amount of their vested benefits under the plan, they were participants under ERISA. *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan*, 883 F.2d 345, 350 (5th Cir. 1989).

[6] 29 U.S.C. ' 1002(7).

Having determined that no distribution took place prior to the decedent's death and that the proceeds from the decedent's account are payable as death benefits, I must now decide who is the beneficiary of the decedent's trust account. Section 6.07 states in relevant part:

> Any distribution made under any provision of the Plan shall be made to the Participant if he is living . . . . If the Participant is not living, any distribution shall be made in full to the Participant's surviving spouse, if any, and, if none, by right of representation to the Participant's surviving issue, if any, and if none is living, to the persons who would be entitled to take the Participant's personal estate if the Participant had died at the time for distribution intestate, unmarried and domiciled in Massachusetts; *provided, that if the participant shall have made an Effective Beneficiary Designation distribution shall be made in accordance with it instead*.

Id., ' 6.07 at p. 28 (emphasis added). Section 6.08 defines the term ``Effective Beneficiary Designation" as follows:

> An effective Beneficiary Designation is a written direction, signed by the Participant and not subsequently revoked in writing, and delivered to the Committee during the Participant's lifetime designating a person or persons (including individuals, partnerships, corporations and trusts) to receive a distribution to be made when the Participant is not living, if the person or persons designated is or are living or in existence when the distribution is to be made, with such order of priority as may be specified.

Id., ' 6.08 at p. 28.

It is clear at the outset that defendant Fitzpatrick takes nothing from her status as the decedent's designated primary WPSP beneficiary since the decedent elected to and did receive a lump sum distribution of the vested balance of his WPSP account during his lifetime, thus terminating his participation in the WPSP. *See Kuntz v. Reese*, 785 F.2d at 1411 (former employees whose vested benefits under the plan have already been distributed in a lump sum are not ``participants" within the meaning of ERISA). *See also* 29 C.F.R. ' 2510.3-3(d)(ii)(B). Likewise, Fitzpatrick's status as secondary beneficiary of the decedent's WESOP account is unavailing because the designated primary

beneficiary, defendant Martin, survived the decedent. *See* Stipulation Exh. #4. Defendant Fitzpatrick has filed no motion for judgment or any opposition to the motions for judgment of defendants Thibodeau and Martin in apparent recognition of the fact that she has no claim to the proceeds deposited in the registry of the court.

The issue then is whether the WESOP beneficiary designation form which names Martin as the primary beneficiary constitutes an effective beneficiary designation pursuant to the Winter Trust. Defendant Thibodeau asserts that it does not citing the following language in the WESOP beneficiary designation form:

> I hereby direct that any and all benefits payable under the terms of the V.P. Winter Distributing Co. Employee Stock Ownership Plan by reason of my death be payable to the following beneficiary or beneficiaries . . . subject to the provisions of said Plan.

Stipulation Exh. #4. Thibodeau claims that, because the form says nothing about being applicable to the Winter Trust and the Winter Trust does not address the applicability of the designation forms for the plans which formed the trust, the WESOP beneficiary designation is without significance. This argument clearly fails. Because the beneficiary designation was executed prior to the formation of the Winter Trust, no significance can attach to the fact it makes no reference to the Winter Trust. Moreover, the definition of an Effective Beneficiary Designation contained in the Winter Trust does not exclude those designations made under the plans which comprise the Winter Trust.[7] The Winter Trust itself, rather than being a wholly new profit-sharing plan, represents the merger of the WPSP into the WESOP and as such is simply an amended version of the WESOP. Thus, I conclude that

[7] For an analogous situation in a life insurance context see *Davis v. Travelers Ins. Co.*, 196 N.W.2d 526, 530 (Iowa 1972) (beneficiary of a superseded policy was found as a matter of law to be the beneficiary of a replacement policy where the decedent failed to make any change in the beneficiary designation).

the effective beneficiary designation form executed by the decedent for the WESOP continued in effect when the Winter Trust was adopted.

Finally, Thibodeau argues that the decedent revoked in writing the designation naming Martin as primary beneficiary by executing on October 3, 1988 the form by which he elected to receive a lump sum distribution of his trust account. Although the decedent elected to receive a distribution, he made no written statement revoking the beneficiary designation or indicating an intent that if he died prior to receiving his distribution the funds should be payable to someone other than the person he had already designated.[8] I conclude that the election by the decedent did not constitute a written revocation of the beneficiary designation and that, therefore, defendant Martin as the named primary beneficiary of the effective beneficiary designation is entitled to the balance of the deposited funds remaining after payment of court-ordered attorneys fees.

For the foregoing reasons I recommend that defendant Martin's motion for judgment be ***GRANTED*** and that defendant Thibodeau's motion be ***DENIED***.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

[8] At least one court has stated, again in a life insurance context, that, in order to demonstrate substantial compliance with policy provisions for effecting a change in beneficiaries, evidence must be shown that the insured definitely intended to change the beneficiary and did everything possible to effect that change. *See Pipe Fitters' Local No. 392 Pension Plan v. Huddle*, 549 F. Supp. 359, 361 (S.D. Ohio 1982). In this case the decedent knew that the processing of his election to receive benefits would take a certain amount of time, see letter dated October 3, 1988 from George A. Courtot to Richard Thibodeau, Stipulation Exh. #6, and, if he so desired, he could have changed his beneficiary designation to be effective during such processing period.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 21st day of March, 1990.

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David M. Cohen
United States Magistrate